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NO. 96-6298

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH, ***Petitioner,***

v.

JAMES P. MURPHY, ***Respondent***

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF FOR *AMICI CURIAE* STATES OF OHIO, WASHINGTON, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY,LOUISIANA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WYOMING AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICI* INTEREST

The States of Washington and Ohio, together with forty other States and Territories, join in supporting respondent as *amici curiae* and in urging the Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

The *amici* States, particularly the offices of their attorneys general, have first-hand experience with federal habeas claims and with the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"). The States' attorneys general are chiefly responsible for defending federal habeas claims, they were active proponents of the Act, and they are vitally interested in seeing the provisions of the Act applied to pending cases. Nor does the States' interest in this case stem solely from their desire to uphold State-court criminal convictions. They also wish to respect the interests of victims in defending these convictions.

The application of the Act to pending cases concerns the States for a final reason. Until recently, many of the statutory and judicial changes to federal habeas law expanded, rather than contracted, the tools available to State prisoners to overturn their State-court convictions. At every

turn, the courts applied these changes to pending habeas cases. That was appropriate under this Court's retroactivity case law. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 114 S. Ct. 483 (1994). It is no less appropriate, not to mention even-handed, to apply changes that contract the jurisdiction of federal courts to pending habeas cases seeking to upset State criminal convictions. For these reasons and those elaborated below, the *amici* States join their sister State, Wisconsin, in asking the Court to affirm the decision below.

SUMMARY OF ARGUMENT

The Act does not have retroactive effect. It does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505.

In examining whether the Act has retroactive effect, it is appropriate initially to place the inquiry in context -- to look at prior changes to federal habeas law and the application of these changes to already-completed State-court criminal convictions. Early federal laws created only modest power to release individuals held in State custody. Beginning in 1789, a federal court could issue the writ to produce a State prisoner whose testimony was needed. By 1833, a federal court could issue the writ if a State prisoner was committed for adhering to a requirement under federal law. And by 1842, a federal court could issue the writ if a State prisoner was a citizen of a foreign State.

Soon after the Civil War, Congress significantly expanded these limited forms of relief by enacting the Habeas Corpus Act of 1867. Comparable in scope to the then-existing authority of federal prisoners to challenge their

detention, the Act thus did not allow State prisoners to challenge detentions compelled by a court of competent jurisdiction. Decisions of this Court, however, eventually gave a broader construction to the scope of the writ. Eventually the Court allowed State prisoners to challenge the adequacy of the State judicial process, which came to include the authority to relitigate *de novo* the substance of legal claims fully litigated in State court, to reexamine facts found in State criminal trials, and to address legal claims that prisoners had failed to raise in accordance with State procedural rules.

Additional statutory changes to federal habeas law occurred during the last half century. In 1948, Congress established an exhaustion requirement. In 1966, Congress limited review of State-court evidentiary proceedings. And in 1996, Congress limited the jurisdiction of federal courts to overturn State-court convictions premised on reasonable determinations of law and fact.

At every turn, including most recently in the 1996 Act, *see Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996), the courts have applied these changes to the scope of federal habeas review to pending cases and to previously-completed State-court convictions. Indeed, the State *amici* do not know of a single instance in which the federal courts did not apply such changes to pending cases (save when Congress expressly directed the courts not to do so). It is both appropriate and fair to continue to adhere to this even-handed tradition: Thus, whether the change in law expands habeas jurisdiction (which helps State prisoners) or limits federal habeas jurisdiction (which helps the States), the modification ought to apply to pending cases unless Congress has clearly said otherwise.

Not surprisingly, in view of this historical practice, *Landgraf* also supports application of the Act to pending cases. The Act simply does not have an impermissible retroactive effect in this setting. First, where Congress acts to restrict the jurisdiction of federal courts, as it did here, the new law governs pending cases "because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 114 S. Ct. at 1502 (internal quotation omitted). Second, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 114 S. Ct. at 1501. Equitable and injunctive in nature, habeas relief is plainly a form of prospective relief, even when it applies to conduct that occurred before a statute's passage. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). Third, legislation does not have retroactive effect within the meaning of *Landgraf* when it regulates secondary conduct (the process of seeking collateral relief from a criminal conviction), as opposed to primary behavior (the process of determining whether someone has violated a States' criminal laws). *See Landgraf*, 114 S. Ct. at 1502, 1505. Nor, for these reasons, can petitioner tenably claim that the Act increases liability for his prior criminal conduct, imposes new duties on him with respect to the underlying criminal actions, or impairs any rights he possessed at the time he committed the crime.

ARGUMENT

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas petitioner may not obtain relief from a State-court conviction "unless the adjudication of the claim"

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. Section 2254(d). The amendment thus deprives district courts of their previously-held jurisdiction to conduct *de novo* review of the facts and law underlying State-court criminal convictions. Even though this change does not regulate the underlying conduct that caused petitioner to be incarcerated in the first place, he contends that the change should not apply to cases pending prior to the date of enactment because it would upset settled expectations relating to the scope of habeas review and attach new legal consequences to his pre-Act conduct. When measured against the historical practice in this area as well as the teachings of *Landgraf*, this claim does not withstand close scrutiny. The decision below should be affirmed.

A. THE COURTS TRADITIONALLY HAVE APPLIED CHANGES TO THEIR JURISDICTION OVER STATE-PRISONER HABEAS CORPUS CLAIMS TO PENDING CASES.

At the outset the right to make a collateral attack on a State-court criminal conviction under federal law did not exist at all. Neither the United States Constitution nor Congress gave the federal courts such power as an original matter. Nor has the Constitution done so since, or for that matter even required State courts to guarantee criminal

appeals, *see Goeke v. Branch*, __ U.S. __, 115 S. Ct. 1275, 1278 (1995); *McKane v. Durston*, 153 U.S. 684 (1894). The authority to establish habeas review of State-court convictions and determine its parameters has long rested with Congress. *Felker v. Turpin*, 116 S. Ct. 2333 (1996).

1. The Right Collaterally To Attack State-Court Criminal Convictions Has Changed Dramatically During The Last 200 Years.

Early on Congress created the barest of federal habeas corpus remedies to release individuals held in State custody. Beginning in 1789, with passage of the First Judiciary Act, a federal court could issue the writ to produce a State prisoner if it was "necessary to be brought into court to testify." Act of Sept. 24, 1789, ch. 20, Section 14, 1 Stat. 82. By 1833, State prisoners could obtain the writ if they were "committed for any act done in pursuance of a law of the United States." Act of March 2, 1833, ch. 57, Section 7, 4 Stat. 634-35. And by 1842, State prisoners could be released if they were a "subject or citizen of a foreign State, and domiciled therein," and held under State law. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540.

Soon after the Civil War, Congress expanded these limited forms of relief by enacting the Habeas Corpus Act of 1867. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Similar in scope to the then-existing authority of federal prisoners to challenge their detention, the Act thus was not available to challenge detentions resulting from a judgment issued by a court of competent jurisdiction. *See* First Judiciary Act, 1 Stat. 81-82 (authorizing federal prisoners to challenge their detention); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be

unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."); *Kuhlman v. Wilson*, 477 U.S. 436, 445-46 (1986) (plurality opinion) ("Until the early years of this century, the substantive scope of the federal habeas corpus statutes was defined by reference to the scope of the writ at common law."); *Fay v. Noia*, 372 U.S. 391, 452-54 (1963) (Harlan, J., dissenting).

Over time decisions of this Court gave a broader construction to the scope of the statutory writ. Eventually the Court allowed State prisoners to challenge the adequacy of the judicial process. *See Frank v. Mangum*, 237 U.S. 309 (1915); *Moore v. Dempsey*, 261 U.S. 86 (1923). This came to include (1) the authority to relitigate *de novo* the substance of the legal claims litigated in State court, *Brown v. Allen*, 344 U.S. 443 (1953), (2) the authority to reexamine facts found in State criminal trials, *Townsend v. Sain*, 372 U.S. 293 (1963), and (3) the authority to address legal claims that prisoners had failed to raise in accordance with State procedural rules, *Fay v. Noia*, *supra*.

Since 1963, several decisions of the Court have narrowed the federal courts' scope of review to alter State-court criminal convictions. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 482 (1976) (limiting habeas corpus review of Fourth Amendment claims); *Sumner v. Mata*, 449 U.S. 539, 549-51 (1981) (applying a presumption of correctness to State-court findings of fact); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977) (applying the procedural default doctrine to State-court habeas claims); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (precluding the application of new constitutional rules of criminal procedure to State-court habeas claims); *McCleskey v. Zant*, 499 U.S. 467 (1991) (applying abuse of writ doctrine); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (applying harmless error rule to State-court habeas claims).

At the same time, Congress itself has statutorily altered the scope of the writ during the last 50 years. In 1948, Congress codified an exhaustion requirement for federal habeas claims. 28 U.S.C. Section 2254, Ch. 646, 62 Stat. 964 (1948). In 1966, Congress limited review of State-court evidentiary proceedings. 28 U.S.C. Sections 2241, *et seq.*, Pub. L. No. 89-590, 80 Stat. 811 (1966); Pub. L. No. 89-711, 80 Stat. 1105 (1966). And, just last year, Congress enacted the Antiterrorism and Effective Death Penalty Act.

2. Congress And The Courts Have Customarily Applied Changes In Federal Habeas Jurisdiction To Pending Cases, Whether Those Changes Expanded Or Contracted The Scope Of The Writ.

At every turn in the evolution of federal habeas corpus review, to the State *amici's* knowledge, the courts have applied these changes to pending cases. The eighteenth and nineteenth century statutory expansions of the writ, from all appearances, applied to pending cases. Nothing in the case law, or the language of the acts themselves, suggests that they were not effective upon announcement. As a result, each of these changes created an immediate new remedy to obtain release from a State-court conviction.

The experience in the twentieth century has been no different. Both the 1948 and 1966 statutory amendments to the writ were applied to pending cases. *See Gusik v. Schilder*, 340 U.S. 128, 131-133 & n.4 (1950) (applying the 1948 amendment to pending claims); *Smith v. Yeager*, 393 U.S. 122, 124-125 (1968) (applying the 1966 amendment to pending claims); *Carafas v. LaVallee*, 391 U.S. 234, 239

(1968) (same). Even the 1996 Act has already been applied to pending claims, at least with respect to other portions of the Act. *See Felker v. Turpin*, 116 S. Ct. 2333 (1996).

The same has occurred with respect to new interpretations of habeas law by the courts. Even though different factors govern the application of new decisions to pending cases, *see Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), statutory *and* judicial changes have been applied to pending cases. *See, e.g., Stone v. Powell*, 428 U.S. at 495 n.38 (rejecting petitioner's contention that any change should be applied prospectively); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (applying the cause and prejudice doctrine to pending case); *Sumner v. Mata*, 449 U.S. 539, 549-51 (applying presumption of correctness of State court findings of fact to pending case); *Brown v. Allen*, 344 U.S. 443 (1953) (applying interpretation to pending case). The *amici* States are not aware of a single decision, regardless of whether it narrowed or expanded the scope of the writ, that did not apply to pending cases.

Against this historical backdrop, petitioner's claim (Br. 48) that fairness and individual expectations prevent application of the Act to pending cases rings hollow. In light of the unbroken tradition of applying changes to pending cases, petitioner's expectation has no basis in fact. Unless Congress speaks clearly to the contrary, all changes have been applied to pending cases. And no doubt, when Congress chooses to do so, it knows how to indicate that a change does not affect pending cases. *See* Act Section 211 (making changes in restitution law and procedures applicable only to "sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment"); Section 235(h) (provisions concerning closed circuit television of court proceedings apply only to cases filed after January 1, 1995); Section 435 (provision expanding criteria

for deporting aliens convicted of crimes of moral turpitude applicable to those "against whom deportation proceedings are initiated after the date of enactment"); Section 441 (amendment limiting collateral attacks on deportation orders applicable only where criminal proceedings initiated after the date of enactment); Section 903 (making changes in the rate of compensation of appointed counsel in certain capital cases apply only to cases commenced or appeals perfected "on or after the date of enactment"). *See also* Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts, Pub. L. 94-426 § 1, 90 Stat. 1334 (1976) (applying rules governing habeas petitions brought under Section 2254 to claims filed on or after February 1, 1997).

Nor does fairness advance petitioner's claim. The States have benefitted *and* suffered from changes to federal habeas law. So have State-court prisoners. Just as many expansions of the writ have been applied to pending cases to the frustration of the States, so also many of the contractions of the writ have been applied to pending cases to the frustration of State prisoners. *Compare Brown v. Allen*, 344 U.S. 443; *Fay v. Noia*, 372 U.S. 391 *with Stone v. Powell*, 428 U.S. 465; *Wainwright v. Sykes*, 433 U.S. 72; *Sumner v. Mata*, 449 U.S. 539. Fairness, then, favors application of the Act to pending cases because it ensures that modifications to habeas law apply evenhandedly to States and State prisoners alike.

B. *LANDGRAF* CONFIRMS WHAT HISTORY TEACHES -- THE ACT APPLIES TO PENDING CASES.

Application of changes to federal habeas law to pending cases has not only been the norm throughout history, but it has also been consistent with this Court's retroactivity

case law.

A statute does not operate retroactively merely because it draws upon antecedent facts, applies to a case that arose before the statute was enacted, or reduces the chance of prevailing in a pending case. *Landgraf*, 114 S. Ct. at 1499; *Cox v. Hart*, 260 U.S. 427, 435 (1922). "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S. Ct. at 1499. A statute has retroactive effect only if it "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981). In the end, a statute may be said to change the legal consequences of completed acts only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505.

In announcing this test, *Landgraf* offered several safe harbors -- settings in which application of a new statute enacted during the pendency of an action would "unquestionably" be proper. *Id.* at 1501. Among them were the following: (1) "the intervening statute authorizes or affects the propriety of prospective relief"; (2) the statute confers or ousts jurisdiction; or (3) the statute constitutes merely a change in procedural rules. *Id.* at 1501-02. Each of these safe harbors applies here.

1. The Act Applies To Pending Cases Because It Merely Restricts The Federal Courts' Statutory Jurisdiction Over Habeas Claims.

"Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 433, 460 (1953). The authority to grant habeas relief to State prisoners thus is derived from and limited by 28 U.S.C. Section 2254.

The congressional power to invest federal courts with jurisdiction includes the power of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). "[T]he judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 116 S. Ct. at 2340 (quoting *Lonchar v. Thomas*, 517 U.S. __, 116 S. Ct. 1293, 1298 (1996)). Congress may therefore enlarge or restrict the authorization to grant habeas relief to State prisoners by amending the relevant habeas statutes. Where Congress acts to restrict jurisdiction, the new law governs pending cases "because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf*, 114 S. Ct. at 1502 (quoting *Republic Nat. Bank of Miami*, 506 U.S. 80, 113 S. Ct. 554 (1992) at 565 (Thomas, J., concurring in part and concurring in judgment)). Courts therefore must apply intervening statutes conferring or ousting jurisdiction, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 114 S. Ct. at 1501; *Bruner v. United States*, 343 U.S. 112, 116-17 (1952).

Quite simply, the amendments to 28 U.S.C. Section 2254 are jurisdictional in nature. They limit the jurisdiction of federal courts to grant habeas relief to State prisoners. With respect to claims adjudicated on the merits in State court, Section 2254(d) now provides that the writ "shall not be granted" unless the State court's decision was "contrary to," or "an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." This establishes an important limitation on a court's jurisdiction. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("clearly established law" must be sufficiently particularized to place a State court on notice that its ruling violates a constitutional right); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (same). Federal courts thus no longer have jurisdiction to issue the writ unless the petitioner's claims fall within the exceptions set forth in subdivisions (d)(1) and (d)(2). In short, federal courts have no power, save that conferred by 28 U.S.C. Section 2254, to grant habeas relief to State prisoners.

In similar fashion, the amendments to Section 2254(e) also restrict the federal courts' jurisdiction to grant habeas relief. In *Sumner v. Mata*, 449 U.S. 539, 547-48 n. 2 (1981), the Court found that the statutory presumption of correctness for State-court findings of fact, contained in former Section 2254(d), limited the exercise of federal habeas jurisdiction. By enacting Section 2254(e)(1), which eliminates the eight exceptions found in former Section 2254(d), and enacting Section 2254(e)(2), which restricts the federal court's authority to conduct evidentiary hearings unless the petitioner meets the statutory prerequisites, Congress has likewise restricted jurisdiction to review the factual determinations of State courts. Because Section 2254(e), like Section 2254(d), speaks only to the power of courts and not to the duties of individuals or governments, it properly applies to petitions pending on the date of

enactment.

2. The Act Applies To Pending Cases Because It Affects The Propriety Only Of Prospective Relief.

"When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 114 S. Ct. at 1501. Case law has long regarded equitable or injunctive relief as prospective rather than retrospective in nature, even when it applies to conduct occurring before a statute's enactment. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 852 (1990); *Hall v. Beals*, 396 U.S. 45, 48 (1969). Injunctive relief by its nature "operates *in futuro*" and therefore is subject on appeal to intervening statutory changes even where relief already was obtained in district court. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921).

Habeas relief, like injunctive relief, is prospective in nature. A habeas petition attacks the fact or duration of a prisoner's confinement and seeks the injunctive (and equitable) remedy of an immediate release. *See Preiser v. Rodriquez*, 411 U.S. 475, 489 & 494 (1973). Both in its origin and in the nature of the remedy itself, the writ has always been deemed equitable in nature. *See Gomez v. U.S. Dist. Court for N.D. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam); *Withrow v. Williams*, 507 U.S. 680, 113 S. Ct. 1745, 1766-67 (1993) (Scalia, J., concurring in part and dissenting in part). Because 28 U.S.C. Section 2254 authorizes prospective injunctive relief, it remains entirely appropriate to apply the Act to pending cases. Much like the Clayton Act at issue in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), the Act here

represents a decision by Congress that a certain type of prospective relief ought not be granted in a defined class of cases. And, as in *American Steel Foundries*, that statutory command applies in any case where the decision granting prospective relief remains subject to review.

3. The Act Applies To Pending Cases Because It Affects Only Secondary Conduct.

The Act also applies to pending cases because it does not regulate primary behavior (*i.e.*, the underlying State criminal conduct), but only the secondary conduct of seeking collateral review of the State criminal judgment. *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("[t]he role of federal habeas proceedings . . . is secondary and limited"); *Lindh v. Murphy*, 96 F.3d 856, 864 (7th Cir. 1996) ("Section 2254(d) does not regulate primary conduct. Instead it makes the initial judgment more stable."). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993). The writ of habeas corpus has historically been viewed as an extraordinary remedy reserved to afford relief for grievous wrongs. *Id.* at 1719. For these reasons, a federal habeas petitioner does not "ordinarily have any claim of reliance on past judicial precedent as a basis for his actions." *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 844 (1993).

Under these circumstances, applying the Act to pending cases would not cross the *Landgraf* line -- by "impair[ing] rights a party possessed when [they] acted," by "increas[ing] a party's liability for past conduct," or by "impos[ing] new duties with respect to transactions already completed." *Landgraf*, 114 S. Ct. at 1505. The amendments simply do not deprive habeas petitioners of any

protected right or interest, and the amendments do not impose any additional penalties or punishments. They do not change the rules defining or penalizing petitioner's crime. Nor can petitioner argue that he relied on the existence of federal *de novo* review of his State-court claims when he committed the crime. And petitioner has no plausible argument that he relied on the former habeas corpus statute in making tactical decisions during the State-court proceedings.

> No § 2254 applicant . . . could persuasively argue that during his trial or prior attacks on the judgment, he relied to his detriment upon the pre-amendment version of [§ 2254]. Release from a conviction or sentence is better sooner rather than later, and acquittal at trial is better yet. It is unlikely that any applicant . . . would pull any punches at trial or in early attacks on the judgment based upon expectations about the prospects of success in later proceedings.

Hunter v. United States, 101 F.3d 1565, 1573 (11th Cir. 1996). This last point is especially true in light of preexisting habeas law. Rules governing exhaustion of State remedies and procedural default not only encouraged petitioners to present all of their federal claims to the State courts, they generally required them to do so.

In the final analysis, the Act applies to all habeas corpus cases pending at the time of its enactment -- above all because the amendments "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 114 S. Ct. at 1502. But whether the question is framed in terms of procedure, jurisdiction, or primary versus secondary conduct, they all indicate that the Act applies to pending habeas corpus petitions.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully request the Court to affirm the decision below.

Respectfully submitted,

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